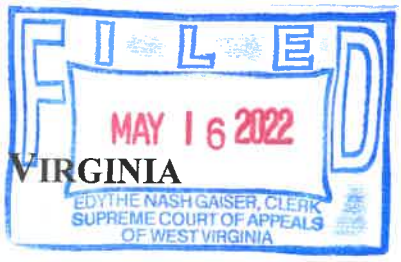

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0806

HENRY JO WARD,
DEFENDANT BELOW,

PETITIONER,

v.

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW,

RESPONDENT.

Appeal from an Order of the Circuit Court of Fayette County, (Indictment No. 21-F-150)

PETITIONER'S BRIEF

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STATEMENT OF JURISDICTION

The Circuit Court of Fayette County had jurisdiction pursuant to Rules 1 and 54 of the *West Virginia Rules of Criminal Procedure* as well as *W. Va. Code* §§ 61-1-1 *et seq.* and 62-1-1 *et seq*. This Court's jurisdiction is invoked under Rule 1 of the *West Virginia Rules of Appellate Procedure*.

STATEMENT OF ISSUES FOR REVIEW

I. Whether the trial court erred by excluding evidentiary inquiry into a government employee's work status in a case where such status is a key element of the crime charged.

II. Whether the trial court erred by barring potentially exculpatory evidence of a government employee's work status in violation of the Petitioner's due process rights.

III. Whether the Petitioner's constitutionally guaranteed protections against double jeopardy were violated at trial.

IV. Whether the trial court erred by acting in the State's favor and misrepresenting the Petitioner's legal burden at trial.

STATEMENT OF THE CASE

In the May 2021 term of the Court in Fayette County, Henry Jo Ward was indicted on nine counts including one count of Attempted Murder, two counts of Wanton Endangerment Involving a Firearm, one count of Malicious Assault on a

Law Enforcement Officer, one count of Presentation of a Firearm during the Commission of a Felony, one misdemeanor count of Obstructing an Officer, one misdemeanor count of Brandishing a Deadly Weapon, one misdemeanor count of Trespassing, and one misdemeanor count of Petit Larceny. (A.R. 581)[1] On July 28, 2021 a jury was selected and the trial of the Defendant began. On July 29, 2021, the jury returned a verdict of guilty of Attempted Murder in the Second Degree, a lesser included offense to Count I of the indictment, as well as a guilty verdict as to every other charge in the indictment with the exception of the two misdemeanor charges of Trespassing and Petit Larceny. (A.R. 152).

The Attempted Murder in the Second Degree conviction carried a maximum sentence of imprisonment of not less than one nor more than three years pursuant to W. Va. Code § 61-11-8(2); The Wanton Endangerment involving a firearm conviction carried a maximum sentence of imprisonment of a definite term of years of not less than one year nor more than five years pursuant to W. Va. Code § 61-7-12; The Malicious Assault conviction carried a maximum sentence of not less than three nor more than fifteen years pursuant to W. Va. Code § 61-2-10B(b); The Presentation of a Firearm During Commission of a Felony conviction carried a maximum sentence of imprisonment of not more than ten years pursuant to W. Va.

[1] References to the Appendix Record-the contents of which were agreed to by the parties-are set forth as "A.R.___."

Code § 61-7-15A; The Obstructing an Officer conviction carried a maximum sentence of confinement to jail for not more than one year pursuant to W. Va. Code § 61-5-17; The Brandishing Deadly Weapon conviction carried a maximum sentence of confinement in the county jail not less than ninety days nor more than one year pursuant to W. Va. Code § 61-7-11.

On September 29, 2021, the Circuit Court below sentenced Mr. Ward to not less than one (1) year nor more than thee (3) years for his conviction of attempted murder in the second degree, a determinate five (5) years and fined one-thousand-dollars ($1,000.00) for his conviction of wanton endangerment involving Coty Pierson, a determinate five (5) years and fined one-thousand dollars ($1,000.00) for his conviction of wanton endangerment involving Jeffrey Barnhouse, not less than three (3) years nor more than fifteen (15) years for his conviction of malicious assault on a law enforcement officer, a determinate ten (10) years for his conviction of the use or presentment of a firearm during the commission of a felony, jailed for one (1) year for his conviction of obstructing an officer, and jailed for one (1) year for his conviction of brandishing a deadly weapon. Each sentence is the maximum available sentence pursuant to their respective statutes and it was ruled that Counts One, Two, Three, Four, and Five of the Indictment No. 21-F-150 be served consecutively and the sentences for Count Six and Seven are to be served concurrently with each other and concurrently with the sentence for Count Five. (A.R. 20-22, 45).

STATEMENT OF THE FACTS

On the morning of November 29, 2020, two individuals – Jeffrey Barnhouse and Coty Pierson – trespassed on the property of Petitioner Henry Jo Ward, falsely accusing him of stealing a hunting camera. Coty Pierson, ostensibly employed by the Fayette County Sheriff's Department, but on a six-week "vacation" (likely suspension), used his false imprimatur as a government agent to harass and intimidate the Petitioner, ultimately leading to the singular discharge of a firearm and Mr. Ward's subsequent incarceration.

The camera in question, which was never recovered among Mr. Ward's possession and which captured a picture of its alleged thief which even the trial court admitted was unidentifiable (A.R. 310-311, 347), belonged to Jeffrey Barnhouse. Jeffrey Barnhouse recruited the help of his cousin, Coty Pierson, undoubtedly to benefit from Pierson's pseudo-status as a sheriff's deputy.

In order to enter Mr. Ward's property, Pierson and Barnhouse had to park at the top of a lane several hundred feet from Mr. Ward's house, and trespass around a physical barrier in the form of a locked gate. (A.R. 285-287, 349). It needs be stressed that Pierson had no warrant (because he was not currently a police officer), was not dressed in uniform (he testified that he was wearing miner's pants and a hooded sweatshirt), did not have his service weapon, handcuffs, police radio, body camera, or any other accessory which would be on his person were he a true

government official. (A.R. 369-370). It is likewise unquestionable that Pierson did not enter Mr. Ward's property under orders from a superior or under the color of law in his official capacity as a police officer. Pierson trespassed on private property solely as an intimidator for his cousin.

After illegally entering private property by traversing a locked gate, Pierson and Barnhouse approached Mr. Ward's home. Upon greeting the trespassers, Mr. Ward calmly and clearly told both to leave his property. (A.R. 520-523) Pierson and Barnhouse refused and assaulted Mr. Ward, throwing him to the ground and placing a knee in his back. Mr. Ward was understandably very upset by this and moved to his truck to retrieve his cigarettes. Not wishing to escalate the situation and give Pierson – whom Mr. Ward knew was a violent individual and who had just assaulted Mr. Ward – an excuse to further injure him, Mr. Ward went to remove his licensed firearm from his waistband and place it in his truck. (A.R. 525). Again, it is important to note that all of this was occurring on Mr. Ward's property, and that Pierson and Barnhouse were trespassers present in a private capacity. Upon seeing the firearm, Pierson acted rashly and in an unsafe manner, striking Mr. Ward's hand and causing the gun to discharge. (A.R. 526-527). Had Pierson acted professionally as would befit a sheriff's deputy, the gun would never have fired.

However, the gun did fire, and therefore – despite being a private citizen minding his own business on his own property – Mr. Ward was arrested, and tried

for felonies some of which were specially categorized as having victimized a police officer (which Pierson was not at the time, being at least on vacation, though very likely suspended). Prior to his arrest, however, Mr. Ward suffered a vicious beating at the hands of Pierson.[2]

Real government officials, in their official capacity, were called to the scene to investigate, but rather than truly investigate, these officials simply adopted Pierson's version of the events wholesale, denying Mr. Ward any protection of law despite the fact that he was maliciously battered on his own property by private individuals who had assaulted him just moments before. (327-328)

At trial, Mr. Ward continued to suffer injustice as described in the argument section of this Petition, *infra*. Mr. Ward's constitutional protections of due process and against double jeopardy were repeatedly violated by the state and with the permission of the trial court. In addition to several wrongful rulings by the trial court regarding objections by the state which denied the jury key facts, the jury was tainted from the beginning of the trial – when a juror was allowed to wax unabated in front of the rest of the jury pool about the unimpeachable trustworthiness of the police – until the end, when a member of the jury finally told the trial court, after it had just

[2] Moore, Josephine, *Fayette County Man Facing a Murder Charge after Assaulting an Officer*, The Register-Herald (Dec. 2, 2020), https://www.register-herald.com/news/fayette-county-man-facing-a-murder-charge-after-assaulting-an-officer/article_7d1582ea-a934-517c-afa0-e9be0a49686a.html (last visited May 16, 2022).

read *Count Seven* of the charges and jury instructions, that she could not hear the judge. (A.R. 100). The trial judge did nothing to remedy this.

This is a case where a private individual pretending to be a government official unprofessionally used his former status to assist his cousin in assaulting a private citizen on his own land ostensibly to retrieve a simple camera. The injustices committed upon Mr. Ward belie his own status as a free American and West Virginia citizen with rights – both to the use and enjoyment of his own private property and, much more alarmingly, to protection under the law. He was unquestionably denied both by the state and the trial court. Pierson assaulted Mr. Ward while trespassing on Mr. Ward's own property and caused a gun to be discharged. Yet, somehow, it is Mr. Ward sitting in a jail cell sentenced to decades in prison. This is not justice and must be remedied.

SUMMARY ARGUMENT

The trial of the Petitioner in this matter was plagued with reversible error, abuse of discretion, and violations of the West Virginia Constitution. At trial, despite legitimate questions concerning Coty Pierson's lack of injury, whether Coty Pierson was involved in the incident in his official capacity as a law-enforcement officer, and whether Coty Pierson was even employed as a law-enforcement officer at the time of the incident, the Petitioner was convicted of malicious assault, among other felony and misdemeanor charges.

The trial court demonstrated clear deference to the State throughout the trial. Despite the existence of ample evidence that Coty Pierson was not a police officer at the time of the incident, and the fact that the involvement of a law enforcement officer acting in his or her official capacity was an essential element of the crime of malicious assault, the trial judge ruled that questions concerning Coty Pierson's status as a police officer were irrelevant. This clearly erroneous ruling was compounded by the Petitioner's trial counsel failing to adequately press the issue. Furthermore, the jury was permitted to believe, without being corrected, that Coty Pierson's testimony, as a police officer, could only be impeached if dishonesty was proven beyond a reasonable doubt. At certain points during trial, the court inappropriately questioned witnesses itself, even questioning the Petitioner outside of his actual testimony. (A.R. 544). The trial court also allowed witnesses to testify as to a picture which was alleged to be the Petitioner stealing a camera, which the trial court admitted was unidentifiable, but refused to allow the jury to see the actual picture.

Double-jeopardy immunity, as well as past precedent set by this Court, prohibits a defendant in such a situation from being convicted and sentenced for both malicious assault and the lesser charge of wanton endangerment. Even so, the Petitioner was convicted of both offenses at trial, representing a clear violation of the Constitutional immunity which protects citizens from receiving multiple

punishments for the same offense. An identical argument also applies to the Petitioner's conviction for brandishing, which is a lesser offense of wanton endangerment, and presentment of a firearm, a statute which the Petitioner contends is unconstitutional.

Such decisions by the trial court represent abuse of discretion, reversible error, and violation of the Petitioner's procedural and substantive due process rights. Accordingly, the Petitioner's convictions should be reversed and remanded for a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant to Rev. R.A.P. 19 is appropriate in this case because it involves assignments of error in the application of well settled law.

ARGUMENT

I. The Facts Presented at the Petitioner's Trial Do Not Support a Conviction for Malicious Assault on a Law Enforcement Officer

The Petitioner was convicted at trial of malicious assault on a law enforcement officer, which was Count IV of his indictment. This charge was patently wrongful, and never should have been presented to the jury. W. Va. Code § 61-2-10B(b) provides:

> Malicious assault. — Any person who maliciously **shoots, stabs, cuts or wounds** or by any means **causes bodily injury** with intent to maim, disfigure, disable or kill a government representative, health care worker, utility

> worker, emergency service personnel, correctional employee or law-enforcement officer **acting in his or her official capacity**, and the person committing the malicious assault knows or has reason to know that the victim is acting in his or her official capacity is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than three nor more than fifteen years.

Id. (emphasis added).

There are several reasons why the Petitioner's conviction on Count IV of his indictment cannot be allowed to stand. The first, and most simple reason is that such conviction simply does not fit the facts of the case even as presented by the State. Count IV of the Petitioner's indictment is not a crime of attempt, but of actual malicious assault committed on a "law-enforcement officer acting in his or her official capacity." At no point in Coty Pierson's account of the event in question was he shot, stabbed, cut or wounded. Presumably, the State presented Coty Pierson's having metal shavings in his hand as the bodily injury necessary to predicate a charge of malicious assault on a law enforcement officer, but this is tortured logic. The receipt of a splinter in an altercation involving a discharged firearm simply cannot be what the Legislature contemplated as the *actus reus* of malicious assault. Coty Pierson, himself, testified that the remedy for his experience was to "just brush and wash" [his hand] and that he received "just little scratches" as a result. (A.R. 378).

Even if the splinter experienced by Coty Pierson were sufficient to constitute the type of "bodily injury" contemplated by the Legislature, the more important portion of the statute emphasized in the above citation is that the law enforcement officer was "acting in his or her official capacity." Throughout the trial, it was abundantly clear that Coty Pierson was not confronting the Petitioner in his official capacity as a police officer. Rather, Pierson was accompanying his own family member in an attempt to intimidate the Petitioner over a trail camera which was never shown to have been taken by the Petitioner, but who was improperly blamed for such both at the time of the incident and throughout the Petitioner's trial, despite there being no evidence supporting such theories.[3] Coty Pierson testified that he was not on the clock (A.R. 348), that his juvenile son was with him when his cousin called him (A.R. 348), and that he did not have his service weapon, handcuffs, badge, radio, or any other trappings of law enforcement with him. (A.R. 369).[4] It was admitted and well established that Coty Pierson was not on duty at the time of the incident. Indeed, at the time of the incident, he was wearing coal miner pants and a gray hooded sweatshirt. (A.R. 369).

[3] The trial judge disallowed the photograph purportedly showing the Petitioner on the remote trail camera from being seen by the jury, but continually allowed the State and its witnesses to reference it with testimony either suggesting or outright stating that the Petitioner was on it and had therefore stolen the camera. These references - without even allowing the jury to decide the content of the photograph, themselves - obviously impermissibly influenced the jury members into believing that the Petitioner was the cause of the altercation, not the overly-aggressive actions of Coty Pierson attempting to intimidate the Petitioner with the imprimatur of legal authority.

[4] Coty Pierson testified only that he had "a gun in [his] vehicle." *Id.*

Furthermore, whether Coty Pierson was a valid law enforcement officer, at all, at the time of the incident is also highly questionable. During cross-examination, Coty Pierson testified that he had been "on vacation" since October 25 and was due back to work December 6 (A.R. 370). That is a period of **exactly** six (6) weeks. During his direct examination, Coty Pierson testified that he had been an officer for just four (4) years (A.R. 342). This obviously raises a question as to how the Fayette County Sheriff's Department is so well staffed as to afford such generous vacation time to its officers.[5] Petitioner's trial counsel attempted to flesh out this obvious inconsistency involving a young officer being granted six (6) weeks' vacation - obviously under the impression that Coty Pierson was not, in fact, "on vacation" but was suspended from duty. However, this important line of questioning was immediately blocked by the State's objection, which the trial judge sustained on the grounds of relevancy. (A.R. 370-371)

The trial judge sustained - on the grounds of relevancy - a line of questioning **directly relating to a major element of Count IV of the Petitioner's indictment**. The Petitioners' trial counsels' questions regarding when Coty Pierson began his "vacation" and when it ended should not have been so concerning to the State that it required an objection, at all, much less a last-ditch objection for relevance that, given

[5] This article from 2018 regarding the Fayette County Sheriff's Office's search for a new deputy states: Benefits include a starting salary of $33,391.00, annual pay raises, **15 paid vacation and sick days a year**, paid holidays and much more." https://woay.com/fayette-county-sheriffs-department-looking-for-new-deputies/ (emphasis added).

the elements of the crime charged, was patently wrong.[6] While the Petitioner's trial attorney acted astutely in pursuing this line of questioning, he unfortunately proved ineffective when he failed to fight more vehemently to continue it over the State's objection and the trial judge's patently incorrect ruling.

Because the jury was not permitted to hear factual testimony regarding an undeniably required element of Count IV of the Petitioner's indictment, there is simply no just remedy available beyond reversal of his conviction for that count.[7]

II. The Petitioner Suffered a Multitude of Violations of His Constitutional Protection Against Double Jeopardy

The fact that the trial court disallowed the jury to hear invaluable testimony regarding whether Coty Pierson was a law enforcement official acting in his official capacity is important for another reason. This Court has ruled in *State v. Wright*, 200 W. Va. 549, 490 S.E.2d 636 (1997) that "wanton endangerment was [a] lesser included offense of malicious assault, and thus defendant could not be convicted and sentenced for both offenses." It is clear, as discussed, *supra*, that the Petitioner's

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[6] The trial court's disallowance of this line of questioning – as well as the State's failure to provide it in discovery – also presents a violation of the Petitioner's due process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), in which the Supreme Court of the United States held that withholding potentially exculpatory evidence violates due process where the evidence is material. *Id.* As Coty Pierson's status as a legitimate officer of the law constitutes a key element in the crime under which the Petitioner was charged, it is undeniable that any and all evidence surrounding Coty Pierson's "vacation" – or suspension – is exculpatory evidence.

[7] Note that this same argument may be applied to the reversal of the Petitioner's conviction for the misdemeanor charge of obstructing an officer, as Coty Pierson was at no time relevant acting in the capacity of a law enforcement officer.

sentence for malicious assault should be reversed. However, even were this not the case, the Petitioner should not have been found guilty and sentenced for Count II (wanton endangerment as to Coty Pierson) of his indictment as doing so violated the inalienable immunity granted to him by Article III, Section 5 of the West Virginia Constitution against immunity from multiple punishments for the same offense. *Id.* at 552.

It is undeniable that the totality of charges against the Petitioner sprang from a single act - the discharge of a firearm in the presence of Coty Pierson and his cousin. Therefore, the principles of double jeopardy have been violated in this case by the Petitioner being found guilty of and sentenced for both wanton endangerment and malicious assault. This Court, in *Wright*, analyzed this issue and stated:

> Our traditional test for determining if the act is one or two offenses is stated in *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The *Blockburger* test is stated in Syllabus Point 4 of *State v. Gill,* which provides: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

State v. Wright, at 553.

This Court did note that these two charges do not always constitute double jeopardy, but, when analyzing that specific case (which was strikingly similar to the instant case insomuch as the defendant was on trial for a single criminal act - the discrete firing of single shot), the Court stated:

> However, in this case, **both convictions are predicated on a single act involving a single gunshot**. In this case, the elements of wanton endangerment include: (1) the defendant (2) did wantonly perform (3) with a firearm (4) an act (5) creating substantial risk of (6) death or serious bodily injury to another. *See* note 1 for provisions of *W.Va. Code,* 61–7–12 [1994]. And in this case, the elements of malicious assault include: (1) the defendant (2) maliciously (3) shot with a firearm [statute says "shoot, stab, cut or wound"] (4) causing bodily harm to the victim (5) with intent to main, disfigure, disable or kill. *See* note 2 for the provisions of *W.Va. Code,* 61–2–9(a) [1978]; *State v. George,* 185 W.Va. at 543, 408 S.E.2d at 295. **The malicious assault charge, in this case, was based entirely upon Mr. Wright's use of a firearm**.

Id. (emphasis added).

The State will likely argue that there is a distinct difference between the instant case and *Wright* - that the Petitioner was charged not with "regular" malicious assault, but malicious assault on a law enforcement officer, which contains the additional element that the victim of that crime be a law enforcement officer or otherwise an agent of the government. However, this argument fails as that element of the Petitioner's malicious assault charge was unproven at trial and, in fact, owing

to the actions of the State and the trial court, was intentionally kept from the purview of the jury's analysis (*see* argument, *supra*).

The same argument can be applied to the Petitioner's brandishing conviction from Count VII of the indictment. W. Va. Code § 61-7-11 states that "[i]t shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace." *Id.* It is obvious that the Petitioner's charge of wanton endangerment involving a firearm entirely subsumes every element of this crime. Brandishing a deadly weapon is of course a lesser included offense in a wanton endangerment charge.

In fact, in *State v. Bell*, 211 W. Va. 308, 565 S.E.2d 430 (2002), this Court held that not only is brandishing a deadly weapon a lesser included offense to wanton endangerment with a firearm, but that **failure to give such instruction at trial was reversible error**. *Id.* at 314. There is little more analysis needed on this point. The Petitioner was charged with, tried on, convicted of, and sentenced for wanton endangerment with a firearm *and* the obviously lesser included charge of brandishing. There is no other remedy but to find the trial court abused its discretion and to reverse the Petitioner's conviction with instruction that he be retried with the appropriate jury instructions.

As the Petitioner was charged with a singular act - discharging a firearm one time - it makes sense that the State, in its efforts to secure conviction, might carelessly overload the indictment and run afoul of the Petitioner's double jeopardy protections multiple times. Another such time is the Petitioner's conviction for presentment of a firearm during the commission of a felony. Every felony which the Petitioner was tried on and convicted of had the same *actus reus* - the firing of a gun once. It is obvious that the presentment charge found in W. Va. Code § 61-7-15A violates double jeopardy because its only element is exactly as it sounds - presentment of a firearm, which happens to be the act which is every felony for which the Petitioner was charged. The State will likely argue that the statute has one clear caveat: that it begins "[a]s a separate and distinct offense, and in addition to any and all other offenses provided for in this code…" *Id.*

While this argument is admittedly more sound than other counter arguments to the Petitioner's challenges of his trial, the Petitioner challenges the very statute of which he was convicted. While the Legislature made an obvious carve-out to avoid just these types of double jeopardy challenges, the fact is that the Legislature is not empowered to legislate away Constitutional rights. Again, immunity from multiple punishments for the same offense (*not* "crime" or "statute") is found in Article III, Section 5 of the **West Virginia Constitution**. This case represents an opportunity for this Court to rectify the Legislature's unconstitutional act. It should do so and

find that the statute in question, at the very least, will in certain instances (such as the instant case) violate double jeopardy protections and therefore the qualifying language preceding the actual elements of the crime must be removed as it impermissibly allows prosecutors in this State the ability to violate this State's citizens' constitutional rights.

It is clear that the Petitioner's constitutional protections were repeatedly violated in this case in an effort to ensure conviction by any means necessary. No remedy less than reversal or remand for a new trial could possibly correct such errors.

III. The Trial Court Abused its Discretion by Favoring the State throughout the Petitioner's Trial

The Petitioner suffered a multitude of injustices in his trial all of which inured to the State's benefit allowing it a conviction without ever proving its case. Beginning with the *voir dire* process, at least one potential juror, in full hearing of the rest of the undersized jury pool, (A.R. 8-9), testified declaratively that police officer testimony - which was clearly the central part of the State's case - carried more weight than other witnesses. (A.R. 244). After being corrected on this point, the potential juror stated his belief that a police officer's testimony could only be impeached if it were proven **beyond a reasonable doubt** (presumably by the Defendant) that the officer had lied. (A.R. 245). This potential juror was asked several follow-up questions by the trial court and **never corrected as to this last**

declaration, implying to the remaining potential jurors that the Petitioner had the burden to prove **beyond a reasonable doubt** that the testifying officers (and those who were not officers at the relevant time of the incident) were lying. This misrepresentation of the very foundations of this State's legal system occurred at the *very beginning* of the Petitioner's trial and obviously impermissibly colored all that was to come. While the potential juror in question was struck, no juror who heard the exchange between that potential juror and the trial court judge could possibly proceed in the trial in an impartial manner having had the exact opposite standard of proof presented and implied to him or her by the trial court judge. Such injustices occurred until the very end of the Petitioner's trial, as well. A member of the jury told the trial court, after it had read all the way through ***Count Seven*** of the charges and jury instructions, that she could not hear the judge. (A.R. 100). The trial judge likewise did nothing to remedy this.

As discussed, *supra*, at least one objection sustained by the trial court was patently wrong and an abuse of discretion. At other points in the trial, the trial court took it upon itself to question witnesses (A.R. 382-383) *and even the Petitioner outside of his actual testimony*. (A.R. 543-544). This is obviously indicative of a trial court acting as or, at the very least, propping up the State in a wrongful manner that, again, constitutes a severe abuse of discretion by that court. Also included in this abuse of discretion is the court's finding that the picture which was central to the

case because it allegedly showed the Petitioner as having stolen the trail camera which set off the event in question could not be shown to the jury. While that, *per se*, would not be objectionable, the court allowed the State's witnesses to offer testimony on the picture and its contents without challenge and without the jury being permitted to see the picture and judge for themselves. (A.R. 310-311, 347, 547-548). As the jury's only questions to the court after beginning deliberations were regarding the actual theft of the trail camera, this obviously and impermissibly influenced the trial in the State's favor, only and constitutes reversible error.

Finally, though it cannot be shown from the record, accounts from parties present at the trial report the majority of those present in the courtroom during the trial - and, importantly, when the jury left for deliberations - were police officers. So many, in fact, that several officers were forced to stand for lack of seating. This is inherently problematic, as this case involved an alleged victim who was a police officer (even if one known to be aggressive in nature). The trial court's failure to clear the courtroom of improper influences - in this case, the presence of a multitude of police officers able to stare at jury members as they left to deliberate on a case which involved the victimization of one of their fellow police officers - is reversible error. No jury could reasonably be expected to overcome the potential intimidation and thoughts of consequences if they were to return a not guilty verdict while they

passed under the watchful gaze of angry government agents on their way to deliberate.

These examples, each standing alone, should be enough to constitute an abuse of the trial court's discretion and result in, at the very least, a new trial for the Petitioner. Collectively, they represent a pattern of denial of the Petitioner's procedural and substantive due process rights from the beginning of his trial until its very end.

CONCLUSION

The Petitioner, throughout his entire trial, extending before and beyond, had his procedural and substantive due process rights violated. The jury was kept from hearing key exculpatory evidence regarding an alleged police officer's status as such when said officer came onto the Petitioner's property and accosted him in his unoffical capacity. The Petitioner was certainly denied his constitutionally guaranteed protection against double jeopardy on the majority of the counts for which he was convicted. His trial court, as well, made key errors which undoubtedly influenced the jury against him. Finally, his trial counsel was woefully ineffective, which caused him to suffer a longer term of incarceration than otherwise would have been so. All of these errors combine to show without question that the Appellant

did not receive a fair trial and the only remedy to be a reversal of his conviction and a remand for a new trial.

Signed: 

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0806

HENRY JO WARD,
DEFENDANT BELOW,

PETITIONER,

Appeal from an Order of the Circuit Court of Fayette County, (Indictment No. 21-F-150)

v.

STATE OF WEST VIRGINIA,
PLAINTIFF BELOW,

RESPONDENT.

CERTIFICATE OF SERVICE

I, Troy N. Giatras, hereby certify that a true and correct copies of the foregoing ***Petitioner's Brief*** and ***Appendix*** were served upon the following persons via United States Mail, postage prepaid, in a sealed envelope, as indicated below:

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